IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1792 OF 2005
ALONGWITH
CRIMINAL WRIT PETITION NO. 1795 OF 2005

Rajesh Sarvaiya ...Petitioner

Versus

State of Maharashtra & Anr ...Respondents

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Mr. Dilip Devadiga, Advocate for petitioner

Mrs. Revati Mohite-Dere i/b Miss. Sangita Choudhari, Advocate for Respondent No.2.

Mr. Rajesh More, APP. in W.P. No.1792/05.
Mr. R.S. Khadapkar, APP in W.P. No.1795/05.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 4TH OCTOBER, 2005

P. C.:-

1. Heard the learned advocate for the petitioner i.e. original accused, learned advocate for the respondent i.e. original complainant and the learned A.P.P. for the State.

2. The petitioner is facing prosecution in Criminal Case Nos.110/S/2002 and 213/S/2002 which are pending before the learned Metropolitan Magistrate 14th Court, Girgaon, Mumbai. The said cases are under Section 138 of Negotiable Instruments Act. In the said case the complainant has filed an affidavit of

evidence by way of examination in chief as per amended provisions under Section 145 of Negotiable Instruments Act. The said affidavit was taken on record.

3. The petitioner had preferred an application before the learned Magistrate for calling the complainant for recording his examination in chief. By order dated 20.6.2005, the learned Magistrate rejected the said application. Being aggrieved by the said order, this application has been preferred.

4. The learned advocate for the petitioner has submitted that the complainant has been substituted and the new person who has been substituted in place of the original complainant does not have any personal knowledge about the facts relating to the case, hence, in such case, he cannot be allowed to file his affidavit. It is well settled that in cases of this nature and where the complainant is a company, the original complainant can be substituted. Thus, I find no merit in this submission. This witness would be available for cross examination and his case can always be demolished in the course of cross examination.

5. The learned advocate for the petitioner has submitted that various facts are introduced in the

examination in chief in the form of affidavit which do not find place in the complaint, this would cause prejudice to the petitioner, hence, the complainant ought to be directed to lead oral evidence in the form of examination in chief. However, it is pertinent to note that the evidence in the form of affidavit is subjected to cross examination under Section 145 of Negotiable Instruments Act. In such case all the omissions or contradictions can be brought on record during the course of cross examination. Hence, there can be no question of prejudice to the accused.

6. In view of the amended provisions of Section 145 of Negotiable Instruments Act, the complainant is entitled to lead evidence by way of an affidavit. The Division Bench of this Court in the case of **KSL & Industries Ltd. Vs. Mannalal Khandelwal & Anr reported in 2005 Cri.L.J. 1201,** has held that the evidence of the complainant in respect of his examination in chief can be taken on affidavit. If evidence of the complainant is taken on affidavit, it would not be necessary to again record examination in chief of the complainant whose affidavit of examination in chief is already filed. The Division Bench was specifically considering the issue i.e. whether, inspite of mandate of Section 145(1) of the Act, the Court is obliged to examine the complainant

even in respect of matters which have been stated in affidavit. The said issue has been decided in para 38 and 39 which read as under:-

> "38. Sub-section (1) of Section 145 gives complete freedom to the complainant either to give his evidence by way of affidavit or by way of oral evidence. If this is made on affidavit, the same has to be accepted and such affidavit is required to be kept on record by the Court. The second part of sub-section (1) provides that the complainant may give his evidence on affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceeding. Thus, it is clear that once the evidence of the complainant is given on affidavit, it may be read in evidence in any enquiry, trial or other proceeding, and it may be subject to all just exceptions.
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> 39. We are clearly of the opinion that according to the language of Section 145 of the Act, the evidence (examination-in-chief) of the complainant can be given on affidavit, and thereafter, if the accused so desires, he/she may

request the Court to call the complainant for cross-examination."

7. This issue also came to be considered by a Single Judge of this Court in the decision **dated 25.7.2005 in Criminal Writ Petition No. 1274 of 2005 (M/s. Indo International Ltd. & Anr Vs. State of Maharashtra & Anr)**. After considering the decision of the Division Bench, the Single Judge of this Court has observed thus:-

" Thus, the law laid down by the Division Bench in the decision of KSL Industries can be summarised as under:

(a) The Court dealing with a complaint under Section 138 of the said Act of 1881 has an option to take evidence of the witnesses on the side of the prosecution as well as evidence of the accused and the defence witnesses, if any, on affidavit.

(b) If the evidence of witness is taken on affidavit, after an application is made by the other party under sub-section (2) of

Section 145, it is not necessary to again record examination in chief of the witness whose affidavit of examination in chief is already filed.

(c) If an affidavit is filed under sub-section (1) of Section 145 and an Application is made under sub-section (2) of section 145 by the other party, the witnesses must be made available for cross-examination by the rival party.

In my view, the decision of the Division Bench clearly and unambiguously lays down the aforesaid propositions of law and the Division Bench has clearly answered the issue which was referred to it by the learned Single Judge of this Court".

8. As far as the apprehension of the petitioner is concerned that various facts which have been introduced in the affidavit which do not find place in the complaint, would go on record, I find the apprehension to be baseless as the evidence in the form of affidavit is subjected to cross examination

under Section 145 of Negotiable Instruments Act. In the course of cross examination accused can bring on record various omissions and contradictions.

9. In the case of **Bipin Shantilal Panchal Vs. State of Gujrat, AIR 2001 SC 1158,** the Supreme Court has observed that whenever an objection is raised during evidence taking stage recording admissibility of any material or item or oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case, subject to such objection being decided at the last stage in the final judgment.

10. Thus, if the course in the case of Bipin Shantilal Panchal (supra), is followed by the trial Court there should not any prejudice to the accused persons. Thus, on perusal of the order of the learned Magistrate dated 20.6.2005 I find that the order is just, legal and proper and no interference is called for. Application is rejected.

11. It is clarified that if any objection is raised during the evidence taking stage regarding admissibility of any material or item or oral evidence, the trial Court to make a note of such objection and mark the objected document or portion tentatively as an Exhibit in the case subject to such

objections to be decided at the last stage during the final judgment.

12. At this stage the learned advocate for the petitioner state that he wishes to challenge this order before the Supreme Court, hence, the proceedings before the trial Court may be stayed for a period of four weeks from today. The said request is reasonable, hence, the proceedings before the trial court are stayed for a period of four weeks from today.

13. Writ petitions are disposed of.

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